D & T Limousine Service, Inc. *and* United Transportation Union, Petitioner. Case 3–RC–10290

February 26, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On June 28, 1995, the Union filed a petition seeking to represent certain employees operating out of the Employer's Selkirk, New York location. The Employer moved to dismiss the petition claiming that it is a carrier under the Railway Labor Act (RLA) and therefore the National Labor Relations Board does not have jurisdiction under the National Labor Relations Act. After a hearing, the Regional Director for Region 3 transferred this proceeding to the Board. Thereafter, the Petitioner and the Employer filed briefs with the Board.

The Board, by a three-member panel, has reviewed the hearing officer's rulings and finds that they are free from prejudicial error. They are affirmed.

On the entire record in this proceeding, the Board finds:

1. The Employer (D & T) is an Ohio corporation engaged in providing transportation services to the railroad industry. The Employer's principal place of business is in Cleveland, Ohio, and it has various facilities located throughout the United States, including one in Selkirk, New York. During calendar year 1994, the Employer realized gross revenues in excess of $500,000 and provided services valued in excess of $50,000 directly to points located outside the State of New York. Annually, the Employer receives in excess of $50,000 for providing services to Conrail, which is an instrumentality of interstate commerce.

The Employer argues that the Board may not exercise jurisdiction over it because D & T is covered by the RLA and is therefore under the jurisdiction of the National Mediation Board (NMB). We do not agree.

In *United Parcel Service*, 318 NLRB 778 (1995), we explained that for nearly 40 years ''the Board has followed a general practice of referring cases to the NMB when a party raises a claim of arguable RLA jurisdiction.''[1] We noted, however, several exceptions to this policy, including cases that presented ''jurisdictional claims in factual situations similar to those where the NMB has previously declined jurisdiction.'' Id. We also noted that when we have previously exercised jurisdiction, we will not thereafter refer a case to NMB unless the employer can establish that its operations have ''undergone a jurisdictionally significant change.'' Id.

In a 1973 case before us, D & T claimed that it existed solely to furnish services to Penn Central Railroad, that D & T employees were under the continuous control of the railroad, and that these employees therefore were covered by the RLA. We referred the question of jurisdiction to the NMB. The NMB found that D & T was not covered by the RLA and declined to assert jurisdiction, stating as follows:

> The National Mediation Board has reviewed the transcript and exhibits submitted with your request, and has determined on the basis of the facts and legal argument that D & T Limousine, Inc. is not a carrier as that term is defined in Section 1, First, of the Railway Labor Act. It does not appear that D & T Limousine, Inc. is either a carrier by railroad or a company which is directly or indirectly owned or controlled by or are under common control with any carrier by railroad. [*D & T Limousine Co.*, 207 NLRB 121, 122 (1973).]

Therefore, based on record evidence presented to us,[2] we found that D & T was an employer under our Act and asserted jurisdiction. *D & T*, supra, 207 NLRB 121. Thus, as explained above, under *United Parcel Service*, the burden is on D & T to show that the factual situation has undergone a jurisdictionally significant change since 1973.

The Employer presents the following in support of its argument that its operations and relationship with the railroads has changed significantly since 1973.

(i) In 1973, D & T had a contract with one railroad, and it now has contracts with other railroads.

That D & T has contracts with other railroads now, or that it is much larger now, is not in itself a jurisdictionally significant change. D & T still performs the same service—shuttling railroad employees to their work—that it performed in 1973.

(ii) The current contracts allow the railroads to exercise significantly more control over D & T's operations than the 1973 contract allowed.

Contrary to D & T's assertion, the record indicates that currently the railroads exercise similar or less control than in 1973. As is the case today, D & T employees in 1973 were required to comply with the railroad's rules and were often dispatched by railroad employees, and D & T was required to provide liability insurance as well as furnish and maintain a two-way radio for every van.

[1] Rather than seeking referral, the Employer moves for dismissal of the petition based on its legal arguments. Given our conclusions, the motion is denied.

[2] D & T's argument that the 1973 case was not fully adjudicated is without merit. In fact, D & T participated in the hearing that fully developed the record that NMB considered, and which we later considered. We do not agree with D & T's contention that whether there was an election in 1973 has a bearing on our disposition of the current case.

In some respects, it appears that D & T's autonomy has increased rather than diminished. D & T admits that it is under no contractual obligation to fire employees according to the railroads' wishes. In contrast, in 1973 D & T was contractually bound to remove employees at the railroad's request for any reason. D & T's reorganization, which is detailed below, also suggests significant autonomy.

(iii) Since 1973, D & T has undergone a reorganization, which has centralized control in the Cleveland office.

Again, contrary to the Employer's assertion, rather than showing a jurisdictionally significant change, the record indicates that the Employer retains substantial control over its operations. For example, after the reorganization, corporate officers in the Cleveland office exercise control over day-to-day operations, such as investigating a railroad's complaint about a particular employee and making the final decision about the hiring of all applicants. Further, the Employer's own contentions belie its argument that D & T's operations are controlled by the railroads. For example, the Employer's brief contains the following assertions:

> The Corporate Officers Promulgate And Implement D&T's Corporate Policies For Its Entire Operations.
>
> The Corporate Officers Establish D&T's Hiring Policies and Direct The Hiring Process For Its Entire Workforce With Assistance From The Cleveland Staff.
>
> The Corporate Officers Establish Disciplinary Policies And Direct The Discipline Process, Which May Include Terminating Employees, For Its Entire Workforce.

In sum, we find that the Employer has failed to show that the factual situation today differs from the factual situation in 1973 in a jurisdictionally significant way. Accordingly, we find that D & T is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the NLRA and that it will effectuate the policies of the Act to assert jurisdiction.[3]

2. We shall remand the case to the Regional Director for resolution of any unresolved issues and to take further appropriate action.[4]

ORDER

It is Ordered that this proceeding is remanded to the Regional Director for Region 3 for further appropriate action consistent with this decision.

CHAIRMAN GOULD, concurring.

For the reasons set forth in my dissenting opinion in *Federal Express Corp.*, 317 NLRB 1155 (1995), I would eliminate the Board's general practice of referring cases involving RLA jurisdictional claims to the NMB for an initial ruling. On the facts of this case, I find there is ample basis for the Board's assertion of jurisdiction. Accordingly, I concur in my colleagues' decision to assert jurisdiction over the Employer and to remand the case to the Regional Director for resolution of any unresolved issues and to take further appropriate action.

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[3] In addition to arguing that it is a carrier covered by the RLA, D & T argues that we cannot assert jurisdiction because a joint employer relationship exists between it and the railroads it services, and the latter entities are subject to the RLA. We find no merit in this contention. In determining whether to assert jurisdiction over an employer with close ties to an exempt entity, ''the Board will only consider whether the employer meets the definition of 'employer' under Section 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards.'' *Management Training Corp.*, 317 NLRB 1355, 1358 (1995). Having found above that D & T is a statutory ''employer'' and that it meets the applicable commerce standard, we conclude that the Employer is subject to our jurisdiction.

Member Cohen dissented in *Management Training Corp.*, and thus he would not apply that precedent to the instant case. That is, if the exempt entity (the railroads) controlled the essential terms and conditions of employment, and D & T controlled only other terms and conditions, Member Cohen would not assert jurisdiction over D & T. D & T does have control over essential terms and conditions, however, and thus Member Cohen would assert jurisdiction over D & T.

[4] The parties disagree on certain unit scope and unit placement issues.